IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CGB OCCUPATIONAL THERAPY, INC., Plaintiff	:	CIVIL ACTION
v.	:	
RHA/PENNSYLVANIA NURSING HOMES, INC., et al., Defendants	:	No. 00-4918

Newcomer, S.J. November , 2002

M E M O R A N D U M

Presently before the Court is Defendants Sunrise Assisted Living, Inc. ("SALI") and Sunrise Assisted Living Management, Inc.'s ("SALMI") Motion for Post Trial Relief, Defendants' Supplemental Brief and Plaintiff's response.

BACKGROUND

The parties are familiar with the intricate and extended history of this matter. Therefore, this Court will dispense with a lengthy resuscitation of those facts elicited in this Court's prior opinions.[1] Defendants SALI and SALMI bring the instant Motion following a four day jury trial which concluded with a $1,985,000.00 award in favor of the Plaintiff, CGB Occupational Therapy, Inc. ("CGB"). The Defendants move this

[1] For a more complete factual explanation of this matter see CGB Occupational Therapy, Inc. v. RHA/Pennsylvania Nursing Homes, Inc., No. 00-CV-4918, 2001 WL 1549824 (E.D. Pa. Dec. 5, 2001).

Court to enter judgment in their favor, or, in the alternative, to order a new trial. In support of this motion, the Defendants raise a plethora of issues, each of which is addressed individually below.

DISCUSSION

I. Defendants' Claims for Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict, pursuant to Federal Rules of Civil Procedure 50, shall be granted if the evidence is such that no reasonable jury could find as the jury in question did. Wittekamp v. Gulf & Western, Inc., 991 F.2d 1137, 1141 (3d Cir. 1993). In applying this standard, the Court must draw all reasonable inferences in favor of the nonmoving party. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000). In addition, in making its determination, the Court is unable to use credibility determinations or weigh the evidence. Id.

A. Statute of Limitations

The Defendants, once again, question whether the Plaintiff met the applicable statute of limitations in its filing. This time, however, it appears the Defendants are

procedurally barred from doing so.[2] Nevertheless, this Court will consider the Defendants' statute of limitations claim in order to correct some misguided and misleading statements concerning this Court's previous clarification of Pennsylvania law.

The Defendants elicit two arguments in support of their position:

1. This Court erred in its interpretation of Pennsylvania law in determining when the statute of limitations on a tortious interference with a contract claim begins to run.
2. Even if this Court was correct in finding that the statute of limitations on a tortious interference with a contract claim does not begin to run before the tort accrues, Plaintiff still failed to timely file.

The Defendants are mistaken on both accounts.

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[2] This issue was decided by the Court on December 5, 2001. CGB Occupational Therapy, Inc. v. RHA/Pennsylvania Nursing Homes, Inc., No. 00-CV-4918, 2001 WL 1549824 (E.D. Pa. Dec. 5, 2001). However, the Defendants failed to raise any objection until recently. In addition, the Defendants have failed, in their current motion, to even argue the standards for relief as presented in Fed.R.Civ.P. 60 or justify by any other means this Court's reconsideration of its December 5, 2001 decision.

The Defendants' first claim fails as a result of their misplaced reliance on the Elliot and Windward cases. As explained at length in this Court's previous opinion, these cases misstate Pennsylvania law with regard to when the statute of limitations trigger in a Pennsylvania tortious interference with a contract claim. In addition, the Defendants suggest that this Court's reliance on Pocono Int'l Raceway, Inc. is misguided. However, the Defendants filed to note that this Court's use of the Pocono case was limited to the excerpt of a single quote which had no relation to the overall premise of the Pocono Court's holding. Finally, the Defendants' use of S.T. Hudson Engineers, Inc. v. Camden Hotel Development Assoc., 747 A.2d 931, 934 (Pa. Super. 2000), suggests that the obvious differences between a claim for breach of contract and a claim for tortious interference with a contract was overlooked.

Defendants' second argument likewise fails. The Defendants spend a significant amount of time arguing that even if this Court was correct in its interpretation of Pennsylvania law, the Plaintiff still failed to timely file. The tortious interference claim at hand did not accrue until September 30, 1998, the day Plaintiff's agreement with RHA was ultimately terminated and five employees left CGB for Prospect or Pembrooke. Therefore, Plaintiff had until September 30, 2000 to file.

Plaintiff timely filed prior to this date. Defendants' argument that the claim accrued earlier is unsound. It wasn't until CGB's employees actually left that CGB had actually incurred damages. Asking CGB, or any plaintiff for that matter, to file a claim prior to actually incurring damages is a preposterous notion.

B. Purposeful Action

Among other things, the Defendants argue that the Plaintiff is precluded from collecting from the Defendants because Defendant Sunrise was merely acting as an agent of Defendant RHA and therefore immune from suit. In addition, Defendants argue that Plaintiff failed to show that the elements for a claim of tortious interference of a contract were actually met. This Court is distressed, to say the least, by the Defendants' erroneous representations of Pennsylvania law.

The cases cited by the Defendants stand for the proposition that an agent may or may not be liable for fulfillment of contractual provisions depending on whether disclosures were made concerning the agent relationship. These cases bear no relevance to the situation at hand where an agent tortiously interfered with a contract. The Defendants represented that these cases stand for a completely different proposition than they actually do. To add insult to injury, the

Defendants were unable to correctly cite these cases. Next, Defendants argue that Plaintiff has failed to meet the elements for a claim of tortious interference of a contract. Such a claim is frivolous. No further discussion need be wasted on this point, except to say, the Plaintiff has met each of the elements of its claim and the Defendants have once again misstated Pennsylvania law.

C. Damages

The Defendants argue that the Plaintiff failed to prove actual legal damage and should therefore be precluded from collecting any compensatory damages. To this end, the Defendants explain that the Plaintiff would have never received payment on the contract because of the financial situation of Defendant RHA. This Court finds this argument unconvincing. Absent any wrongdoing, the Plaintiff still held an enforceable contract with Defendant RHA. In addition, a finding to the contrary would send a dangerous message to companies in financial strife, that is, companies facing financial difficulties need not be held accountable for their actions.

The Defendants also argue that punitive damages were improperly awarded. This Court finds that sufficient evidence was adduced at trial showing the Defendants' conduct to be

outrageous and done intentionally with callous disregard of the Plaintiff. To this end, Plaintiff has presented evidence sufficient to support an award of punitive damages.

II. Defendants' Claims for a New Trial

A trial court may grant a new trial when an error during the original trial prejudiced one party such that the refusal to grant a new trial would result in substantial injustice. Montgomery County v. Microvote Corp., 152 F.Supp.2d 784 (E.D. Pa. 2001).

A. Plaintiff's Request for a Continuance

Defendants argue that this Court's failure to grant their Motion for a Continuance on June 11, 2002, constituted reversible error. Defendants sought a continuance as a result of one of their witnesses, Marjorie Tomes, becoming ill and, consequently, unable to appear in Court to testify.

Failure to grant a continuance in a situation such as this constitutes an abuse of discretion on behalf of the trial court unless the movant's motion was motivated by procrastination, bad planning or bad faith. Gaspar v. Kassm, 493 F.2d 964, 969 (3d Cir. 1974). Here, Defendant's motion was clearly the product of bad planning and, most likely, bad faith.

Defense counsel was required, as per this Court's Pretrial Trial Procedure as well as various orders, to have Ms. Tomes in Court and ready to testify on the morning of June 10, 2002. To the contrary, defense counsel did not produce Ms. Tomes on the first day of trial and could offer no reason for her failure to do so. It appears as though counsel planned to prevent the Plaintiff from calling Ms. Tomes during its case in chief. Had counsel produced Ms. Tomes on the first day of trial, as required, Ms. Tomes' testimony would have concluded the day before she became too ill to testify. Instead, defense counsel notified this Court on the morning of June 11, 2002, that Ms. Tomes was suddenly unavailable. Moreover, counsel asked for an indefinite continuance by offering the Court no idea as to how long the trial would be delayed. Faced with these facts, this Court decided to allow the trial to proceed by using Ms. Tomes' deposition testimony.

No error was committed in denying Defendant's Motion for a Continuance. In her absence, Ms. Tomes' deposition testimony was used. The Defendants had every opportunity afforded to the Plaintiff to question Ms. Tomes at her deposition. In addition, defense counsel apparently accepted the

Court's ruling as she never directly objected to the Court's denial of her motion.[3]

B. Exclusion of Witness Debbie Minella

Defendants argue that the Court erred by not permitting their witness, Debbie Minella, to testify. What the Defendants do not explain in either of their two briefs is that this Court attempted to accommodate the Defendants' habit of late disclosure of witnesses whenever possible but was unable to do so for this witness. Immediately prior to excluding Ms. Minella as a witness, this Court allowed the Defendants to present the surprise testimony of their corporate designee, Mr. Kim. Mr. Kim's testimony was permitted because his proposed testimony did not appear to prejudice the Plaintiff's case as it focused solely on ministerial matters for authentication purposes. In addition, although Mr. Kim's name was never mentioned in Defendants' pretrial memoranda, Defendants had consistently notified Plaintiff that a corporate designee would be called to give testimony consistent with that of Mr. Kim's.

[3] Defense counsel's objections were limited to the manner in which the deposition testimony was to be read and the fact that she was without a copy of the deposition (Plaintiff's counsel subsequently supplied Defendant's counsel with a copy of the deposition).

Conversely, Ms. Minella's proposed testimony did appear to be prejudicial to the Plaintiff's case. The Defendants claim they were unaware of Ms. Minella's involvement in this matter until May 15, 2002. The Defendants should have been aware of Ms. Minella's involvement from the early stages of the case. Defendants' last minute disclosure of Ms. Minella's proposed testimony afforded Plaintiff only one week, immediately prior to trial, in which to prepare for trial and account for a new witness. This Court's pretrial disclosure rules are set forth to protect attorneys from situations such as these. This Court was unable to permit the testimony of Ms. Minella because the proposed testimony violated this Court's pretrial rules and, moreover, because of the proposed testimony's prejudicial effect.

C. Hearsay Testimony

Defendants argue that this Court's preclusion of Debbie Minella's hearsay statements through the deposition of Marjorie Tomes was erroneous, and therefore, the Defendants deserve a new trial. Defense counsel's reliance on Federal Rules of Evidence 804(b)(3) (Statement against interest) to justify the admission of Ms. Minella's hearsay statement is unfounded. Rule 803(b)(3) is limited in application to statements which when made are "contrary to the declarant's pecuniary or proprietary interest."

Courts have consistently found this Rule to be inapplicable to situations where the declarant is jeopardizing the pecuniary or proprietary interests of another. Williamson v. United States, 512 U.S. 594, 598 (1994), Nuttall v. Reading Co., 235 F.2d 546, 550-551 (3d Cir. 1956), Gilmour v. Strescon Industries, Inc., 66 F.R.D. 146, 150 (E.D.Pa. 1975) (Broderick, J.). Here, the Defendants freely admit in both of their briefs that "Ms. Minella's instruction to contact plaintiff's employees is plainly a statement against RHA's interest since it may give rise to a claim against RHA...." The Defendants clearly indicate that Ms. Minella's statements jeopardize the interests of RHA and not those of her own. Although the Defendants did not attempt to argue the applicability of 804(b)(3) in instances, such as here, where the declarant is an employee of the party whose interests are implicated, such an attempt would be fruitless. "It is clear that the declaration must be against the interest of the declarant and where as here the statement is offered as a declaration against the interest of the decarant's employer, the statement does not fall within this exception to the hearsay rule [Rule 804(b)(3)]." Gilmour, 66 F.R.D. at 150 (citing Nuttall, 235 F.2d at 546). Thus, defense counsel was mistaken when she wrote, "...testimony concerning what Ms. Minella said clearly qualifies as an admission against interest under FRE 804(b)(3)."

Ms. Minella's statements amounted to inadmissable hearsay and this Court was correct in sustaining the hearsay objection. Defendants' Motion for a New Trial on these grounds fails.

D. Jury Instructions

Defendants raise two objections concerning the jury instructions as administered by this Court. First, Defendants argue that this Court incorrectly stated the elements to a claim of tortious interference with a contract. Second, the Defendants argue that this Court incorrectly instructed the jury on punitive damages. Defendants are mistaken on both accounts.

The Court correctly stated the elements for a claim of tortious interference of a contract. In fact, the charge as given was previously agreed to and submitted by Defendants' counsel. Likewise, Defendants' claim with regard to the punitive damages instruction is baseless. As this Court explained during the charging conference, sufficient facts had been adduced at trial to justify the award of punitive damages. Defendants' claims with regard to the jury instructions are unfounded and do not justify a new trial.

E. Testimony of Joe Skalamera

Defendants argue their Motion for a New Trial should be granted because this Court improperly prevented the impeachment of Plaintiff's witness, Joe Skalamera. Mr. Skalamera, formerly employed by one time Defendant RHA[4], was called by the Plaintiff to give testimony regarding RHA's instructions to Defendants SALI and SALMI regarding the termination of the contractual relationship with the Plaintiff. The Defendants sought to impeach Mr. Skalmera's testimony by establishing, "the impacts of his alcoholism on his ability to recall events that are now four years old," and "his bias against the moving [D]efendants...."

This Court prevented the Defendants from completing the proposed impeachments because, when carefully considered, Defendants' questions did not amount to an impeachment but were, rather, irrelevant and prejudicial. Specifically, counsel's attempt to impeach the memory of Mr. Skalamera by eliciting the fact that he had a drinking problem became irrelevant when the witness agreed with defense counsel that his memory may be mistaken. In fact, throughout his cross-examination, Mr. Skalamera consistently answered defense counsel's questions by acknowledging that his memory may be mistaken. Therefore, the

[4] RHA served as Defendants' managerial company at the time the Defendants tortiously interfered with Plaintiff's staffing contracts.

impeachment value of his alleged drinking problem became superfluous. The witness had already admitted to the fact on which counsel sought to impeach his testimony. When weighed against its prejudicial effect, the diminished probative value of this testimony did not warrant its introduction to the jury.

Furthermore, the Defendants sought to impeach the testimony of the witness' memory based on the notion that his drinking somehow impaired his ability to remember the events that occurred during his involvement in this matter. To this end, the Defendants offer no proof that even if the witness did overindulge in alcohol his memory was adversely effected. It is common knowledge that everyone reacts differently to the consumption of alcohol. In addition, the Defendants fail to establish that the witness used alcohol during the times that the conversations at issue took place.

Finally, even if this Court committed error in preventing the Defendants from effectuating an impeachment of this witness, the error was harmless. The witness freely admitted his memory may have been wrong. The jury heard the witness admit to the possible inaccuracies of his memory. The inability to impeach a witness' memory when he has already conceded to its possible fallacies does little to prejudice a party's case.

The Defendants also argue that the witness was biased against one time defendant RHA, his former employer, and therefore, was inclined to lie about the events which transpired. RHA is no longer a party to this matter. Therefore, even if the witness was biased against RHA, there is little he could do to subject them to harm in this matter. However, should the witness have devised some method of bringing harm to RHA through his testimony in this matter, it is unlikely that his testimony would prejudice the remaining Defendants, but rather, would implicate his former employer, RHA. While the Defendants are correct in pointing out that he may have a motive to bring harm to RHA, there is no reason to believe that the witness would be inclined to falsify testimony to implicate either of the Defendants. Therefore, the Defendants' proposed impeachment on this point amounts to little more than an effort to confuse the jury and was, therefore, properly excluded.

F. Insurance Testimony

Defendants' assertion that they were somehow prejudiced by testimony concerning insurance coverage is preposterous. The Defendants mislead this Court to believe that the jury actually heard testimony concerning their insurance coverage. In reality, the only testimony elicited on this topic consisted of the

following statement made by Plaintiff's owner, Cindy Brillman, when she was asked about conversations with the Defendant corporations before filing her complaint:

> "I was asking - I hope it was before - it's hard to tell what was before and after the complaint, about insurances"

Immediately after Ms. Brillman made these remarks, counsel objected and this Court sustained that objection. No further testimony pertaining to insurance was permitted. Certainly, no prejudice could have resulted from this testimony. A mistrial is not warranted when a witness merely utters the word "insurance" in open court. If this were the case, witnesses could easily bring the wheels of justice to a grinding halt merely by speaking a single word during their testimony. Moreover, Ms. Brillman never indicated whether the Defendants even had insurance. Under a worse case scenario, the jury entered deliberations knowing that Ms. Brillman inquired as to whether or not they had insurance. Defendants' Motion for a New Trial, as a result of this utterance, is unfounded and was correctly denied during trial.

G. Juror Misconduct

The Defendants' final argument concerns the alleged misconduct of a juror. Defendants' counsel alleges that juror

number two, “admitted that, on the eve of juror deliberations, he took it upon himself to conduct independent research on Sunrise’s Internet web site concerning the defendants’ financial condition.”

“In every case where the trial court learns that a member or members of the jury may have received extra-record information with a potential for substantial prejudice, the trial court must determine whether the members of the jury have been prejudiced.” Government of the Virgin Islands v. Dowling, 814 F.2d 134, 139 (3d Cir. 1987). In making this determination, the Court may only inquire into the existence of any extraneous information. Wilson v. Vermont Castings, Inc., 170 F.3d 391, 394 (3d Cir. 1999). Then, once the existence of such information has been established, the court must make an objective assessment of how the information would affect the hypothetical average juror. Id.

In conducting these investigations, the Court is mindful of the Supreme Court’s concern with regard to the danger such investigations pose to the finality of jury verdicts and the possibility of juror harassment once the proceedings have concluded. Tanner v. United States, 483 U.S. 107, 120 (1987). It is for reasons such as these that trial courts are cautioned to rarely ask jurors to return to the courthouse in order to

participate in a voir dire after a proceeding has ended. United States v. Gilsenan, 949 F.2d 90, 97 (3d Cir. 1991).

For reasons unknown, defense counsel failed to notify this Court of the alleged misconduct while the jurors were still in the courtroom area and able to be easily interviewed by the Court. Instead, counsel waited until filing the instant Motion. Consequently, the Court is faced with the possibility of recalling jurors to the courthouse some four months after a verdict was rendered. In an effort to safeguard the jury system and comply with the instructions as elicited by the Third Circuit, this Court will resolve the situation without taking such unnecessary steps. Instead, the Court will assume, for the purposes of determining whether a new trial is warranted, that those facts pleaded in defense counsel's affidavit are true, that is, that juror number two did research the Defendants' financial status by visiting Defendant Sunrise's web site and factored such information into his thought process when considering the case.

Assuming then that a juror was subjected to extraneous information, this Court must make an objective assessment of how that information would affect a hypothetical average juror. Waldorf v. Shunta, 3 F.3d 701, 710 (3d Cir. 1993). In making this determination, the verdict will stand unless a party has been prejudiced by the misconduct. Virgin Islands v. Gereau, 523

F.2d 140, 153-54 (3d Cir. 1975). It is this Court's finding that no prejudice could have resulted from a juror's exposure to the Defendants' web cites. While the juror never should have disobeyed this Court's constant admonishments not to conduct independent research pertaining to the case, the material published on the Defendants' web cites would have been admissible at trial anyway. In addition, similar information concerning the Defendants' size and holdings was introduced at trial. Therefore, in assessing how this information would effect a hypothetical average juror, the Court is confident that no prejudice could have resulted.

AN APPROPRIATE ORDER WILL FOLLOW.

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Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this day of November, 2002, upon consideration of Defendants' Motion for Post-trial Relief, it is hereby ORDERED that said motion is DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.